

UNITED STATES OF AMERICA)	
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)	
v.)	CRIM. NO. 03-06-B-S
)	
)	
DONALD ANDREWS and)	
KEVIN BROWN,)	
)	
Defendant)	

Kevin Brown and Donald Andrews are charged in a two count indictment with conspiracy to possess with the intent to distribute 50 or more grams of cocaine base and possession with the intent to distribute 50 or more grams of cocaine base. Defendant Kevin Brown has filed five pretrial motions. They are as follows: (1) Motion for Notice of Intention to Use Evidence (Docket No. 18); (2) Motion for Disclosure of Bad Acts (Docket No. 19); (3) Motion for Disclosure of Co-Defendants' Informants (Docket No. 20); (4) Motion for Discovery and Inspection (Docket No. 21); and (5) Motion to Suppress (Docket No. 22). The searches in these matters were conducted pursuant to three state court warrants. I now recommend that the court **DENY** Brown's Motion to Suppress. I have also entered appropriate orders on the other four motions.

Facts

Carl Gottardi, II, Detective Lieutenant with the Somerset County Sheriff's Department and the affiant in all three search warrant affidavits, has been employed by the Somerset County Sheriff's Department for over nineteen years. He has received training and participated in numerous investigations involving the unlawful possession and sale of controlled substances. (Aff. and Req. for Search Warrant, attached to Docket No. 22, ¶ 20.)¹ As a result of his work in law enforcement, Gottardi has become acquainted with an individual identified as 02-91, a confidential informant ("Informant 02-91" or "02-91"). Informant 02-91 has a history of drug addiction, but for the past few years has been a reliable informant for Gottardi. Six people have been arrested for various felony level drug offenses as a result of information provided by 02-91. Furthermore, in 2002 Informant 02-91 made controlled drug purchases for Gottardi. (Id., ¶ 1.)

On December 10, 2002, Informant 02-91 informed Gottardi that Shane Murphy and Tara Michaud, both of Fairfield, Maine, were selling/using crack cocaine on a daily basis. Informant 02-91 told Gottardi details about Murphy and Michaud, including the vehicle they operated, the fact that Murphy was currently on probation, and the fact that their prior residence, a trailer in Smithfield, Maine, had been destroyed in a fire. Gottardi independently confirmed these details. (Id., ¶¶ 2, 3.) Informant 02-91 also told Gottardi that Murphy and Michaud had been purchasing crack cocaine on a daily basis for the past few months prior to December 10 from some black males in Waterville. (Id.)

¹ There are three such affidavits attached to Docket No. 22, each submitted in support of one of the three search warrant requests. The December 23, 2002 affidavits are identical, but for the descriptions of the premises to be search, and they both reproduce the original averments set forth in the December 20, 2002 affidavit, in addition to 14 additional averments.

Informant 02-91 declared that he went with Murphy and Michaud to an apartment on King Street in Waterville to purchase the crack cocaine. (Id., ¶ 4.) Gottardi arranged for 02-91 to make a controlled purchase of crack cocaine from Murphy. Keeping Murphy under constant surveillance, Gottardi confirmed that once 02-91 gave him the money for the crack cocaine purchase, Murphy went directly to 9 King Street and purchased a substance that was later delivered to 02-91 and tested positive as cocaine. (Id., ¶ 5.) Informant 02-91 gave the affiant a detailed description of the black males who sold cocaine at the King Street residence and he also provided details about the location and appearance of the residence. The primary seller was a black male named “Pee Wee” weighing over 300 pounds. (Id., ¶ 6.) During the third week of December 2002, Informant 02-91 made another purchase of cocaine from Murphy and Murphy again informed 02-91 that Pee Wee had supplied the drugs. (Id., ¶ 8.) According to Murphy’s information, supplied to 02-91, Pee Wee and two other black males had recently moved to Waterville from New York and on December 19, 2002, all three of them had returned to New York to “re-up” (re-supply themselves) with crack cocaine. (Id., ¶ 9.)

Gottardi corroborated Pee Wee’s connection with the King Street residence in a number of ways. Informant 02-91 indicated he personally observed Pee Wee entering the same King Street residence where Murphy purchased the cocaine. (Id., ¶ 10.) Gottardi also learned from a citizen informant who had supplied the Waterville Police Department with reliable information in the past that a large black male named James Scriven lived at 9 King Street. Gottardi corroborated with Central Maine Power that a James Scriven did have a power connection at an apartment in the building. (Id., ¶ 11.) Gottardi also learned that Scriven had a Maine identification card that listed his weight at 345 pounds.

(Id., ¶ 12.) He also learned that Scriven had a New York criminal record including a past conviction involving crack cocaine. (Id.)

Gottardi applied for and executed the warrant on December 20, 2002, believing that Scriven had just returned from his trip to New York the previous day. (Id., ¶ 19.) At the time of the search there were four people in the residence, two black males and two black females. (Id., ¶ 21.) Scriven was not present at the residence and one of those present indicated that Scriven was in New York. (Id.) During the execution of the December 20 search warrant, the telephone inside the residence rang several times and displayed the caller ID number of Tara Michaud of Fairfield, Maine. (Id., ¶ 22.) Gottardi also located a small address book with Michaud and Murphy's phone numbers. (Id.)

Informant 02-91 spoke with Gottardi on December 21 and advised him that Murphy and Michaud said that the police had failed to find the cocaine recently brought from New York when they executed the December 20 warrant because the black males had relocated the drugs to another residence. (Id., ¶ 24.) However, and again according to Murphy and Michaud, the men were eager to sell more crack cocaine because the police had seized all of their cash on December 20. On December 21, Murphy and 02-91 traveled to 9 King Street and 02-91 personally saw crack cocaine that Murphy purchased there. (Id., ¶ 23.) Murphy spoke with 02-91 again on December 22 and told him that he had again that day purchased drugs from the black males at 9 King Street. (Id., ¶ 24.)

On December 23, Gottardi executed a search warrant at the residence of Murphy and Michaud. During the search, officers found a small amount of crack cocaine. (Id., ¶ 25.) Gottardi interviewed Michaud while the search was taking place. Michaud admitted to Gottardi that she and Murphy had been buying cocaine from the individuals at the 9

King Street premises. Michaud identified the three black males she had dealt with there as Pee Wee, Corey, and Kevin. (Id., ¶ 26.) She also told Gottardi that these individuals had a “safe house” on College Avenue in Waterville, that Kevin was renting this house for the purpose of storing drugs, that Michaud had visited the house with Kevin earlier that month, and that Kevin retrieved crack cocaine from the kitchen area while they were there. (Id., ¶ 27.) Michaud showed the house to Gottardi that day. (Id.) Michaud also informed Gottardi that there was a hiding spot inside the living room closet at 9 King Street and that she had seen Kevin go to this hiding spot to retrieve crack cocaine for her to purchase. (Id., ¶ 28.) Finally, Michaud informed Gottardi that “one month ago” she had observed the black males with 1500 grams of crack cocaine, but that she did not know how much crack cocaine they had brought back from their latest “re-up” in New York. (Id.) During subsequent questioning by another officer, Michaud indicated that she had broken into the College Avenue premises the previous evening, hoping to find either crack cocaine or cash. Michaud stated that she hurriedly looked through the kitchen area but failed to find any drugs. Michaud departed after a short period of time for fear of being discovered inside the premises. (Id., ¶ 29.)

Detective Thomas Rourke interviewed Murphy separately. According to Gottardi, Murphy informed Detective Rourke that he had been purchasing crack cocaine from three black males at the 9 King Street premises roughly 5-6 times weekly over the preceding “couple of months.” (Id., ¶ 30.) He also stated that he had purchased a gram of crack cocaine from Pee Wee the preceding day and that he believed the men still possessed a quantity of crack cocaine. (Id.)

In the evening of December 23, 2002, Gottardi applied for and obtained a second search warrant for the 9 King Street premises and another search warrant for 143 College Avenue. On this occasion Gottardi presented his affidavits and requests to a justice of the peace rather than a district court judge. The affidavits submitted in support of these search warrants recounted 19 paragraphs of the first affidavit and added additional averments based primarily on the information supplied by Michaud and Murphy following the search of their premises. Due to the lateness of the hour and the likelihood that the December 20 raid would make any occupants especially watchful, Gottardi requested a nighttime, no knock search warrant to be executed that evening. (Id., ¶ 33.) According to Crime Scene Evidence Logs, numerous items, including crack cocaine, were discovered at both premises.

I. The Motion to Suppress

Brown has moved to suppress the evidence obtained during the December 20 and December 23, 2002 searches, contending that the affidavits filed in support of these search warrants do not recite sufficient facts to establish probable cause for the issuance of the warrants. Brown also contends that the Justice of the Peace who issued the warrants failed to exercise independent judgment.

The applicable standard is whether the totality of the circumstances, as set forth within the four corners of the affidavits presented to the state court judge and the justice of the peace, was sufficient to support their findings of probable cause that crimes were being committed and that evidence of said crimes was likely to be discovered in the premises to be searched. United States v. Schaefer, 87 F.3d 562, 565 (1st Cir. 1996). Their findings of probable cause are entitled to “great deference by reviewing courts.”

Illinois v. Gates, 462 U.S. 213, 236 (1983). One aspect of the probable cause determination is whether information related in an affidavit is timely. “[A]n affidavit supporting a search warrant must contain timely information or else it will fail.” United States v. Schaefer, 87 F.3d 562, 568 (1st Cir. 1996). The timeliness factor is not mechanistic, but concerns whether the information at hand is sufficiently current to provide relevant insight into the existence of extant criminal activity. Id. This will depend, in part, on the nature of the criminal activity under investigation. Id.; see also United States v. Ricciardelli, 998 F.2d 8, 18 (1st Cir. 1998) (cataloguing various staleness considerations).

Brown’s contention that the warrants were not supported by probable cause has no merit. The December 20 warrant issued by the District Court Judge was justified in light of the information supplied by 02-91, an informer with a proven track record, that acquaintances of his were purchasing crack cocaine from a man named Pee Wee who resided at the King Street premises. Furthermore, the Judge was made aware of a set up purchase of crack cocaine from the same premises, that the individual to whom the premises was leased had a criminal history involving crack cocaine, and that the set up purchaser (Murphy) understood that Pee Wee and others had recently traveled to New York to restock their supply of crack cocaine. Under these circumstances, the Judge’s finding of probable cause that crimes were being committed at the King Street premises and that evidence of said crimes would likely be discovered there cannot seriously be called into question. The Justice of the Peace was similarly justified in his or her finding of probable cause. Although the December 20, 2002 search did not turn up any drugs or drug paraphernalia, since that time 02-91 learned from Murphy and Michaud that the

search had been unsuccessful because the crack cocaine was stored at another location and that the occupants of King Street were continuing to offer to sell crack cocaine to Murphy. Additionally, 02-91 visited the King Street premises with Murphy the day after the search had been conducted and observed Murphy purchase crack cocaine. Moreover, following the raid on the Murphy/Michaud residence, both Murphy and Michaud provided reliable, self-incriminating statements that the premises located at 143 College Avenue was the “safe house” used by the King Street suspects to store their crack cocaine. Under these circumstances, the justice of the peace’s assessment that drug trafficking was continuing to occur at 9 King Street and that evidence of this crime would likely be found there and at 143 College Avenue is beyond reproach. This finding is not called into question by virtue of Michaud’s failure to discover crack cocaine in the kitchen area of the College Avenue premises during her private nighttime raid. Michaud indicated that she looked only cursorily for fear of discovery and, unlike police, there is no indication that she has any skill whatsoever in searching premises. Moreover, the search warrant request sought more than just drugs. It also indicated that drug paraphernalia and other indicators of drug trafficking would be sought. Thus, Michaud’s failure to find drugs on the evening of December 22, 2002 did not render stale her statements that “Kevin” had collected some crack cocaine from the kitchen area of the premises sometime during the month of December.

Brown’s final contention is that the December 23 search warrants were deficient because they were issued by a justice of the peace rather than a judge. Maine law authorizes justices of the peace to issue search warrants, 15 M.R.S.A. § 55, and this delegation is constitutional provided that the justice of the peace issuing any given

warrant is neutral and detached and has the capacity to make the probable cause determination, Shadwick v. Tampa, 407 U.S. 345, 349-50 (1972). Nothing in Brown's challenge calls either the justice's neutrality or capacity into question. Accordingly, I recommend that the Court **DENY** Brown's Motion to Suppress.

II. Miscellaneous Discovery Motions

In addition to his motion to suppress, Brown has filed the following collection of criminal discovery motions: a motion for notice of intention to use evidence, a motion for disclosure of bad acts, a motion for disclosure of co-defendant informants, and a motion for discovery and inspection. (Docket Nos. 18-21.) In response to these motions, the Government indicates that it has provided Brown with the materials sought pursuant to Rule 16, that there is "an open file of discovery and Jencks material"² that he may examine, that it does not intend at this time to introduce evidence of other bad acts pursuant to Rule 404(b) of the Rules of Evidence, and that it intends to comply with its Brady and Giglio obligations.³ Suffice it to say that there does not appear to be any pending discovery controversy for the Court to resolve and, therefore, the Motions are **DISMISSED** at this time. They may be rejoined at a later date, if necessary.

² See 18 U.S.C. § 3500 (provided, inter alia, that "no statement or report in the possession of the United States which was made by a [g]overnment witness or prospective [g]overnment witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case").

³ See Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); Giglio v. United States, 405 U.S. 150, 154 (1972) (recognizing that the prosecution's disclosure duty under the Brady rule extends to evidence affecting the credibility of material witnesses).

Conclusion

For the reasons stated herein, I recommend that the Court **DENY** Brown's motion to suppress. Brown's various discovery motions are **DISMISSED**.

SO ORDERED.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection. Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

June 11, 2003

Margaret J. Kravchuk
United States Magistrate Judge

U.S. District Court
District of Maine (Bangor)
CRIMINAL DOCKET FOR CASE #: 1:03-cr-00006-GZS-ALL
Internal Use Only

Case title: USA v. ANDREWS, et al
Other court case number(s): None
Magistrate judge case number(s): None

Date Filed: 02/05/03

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Pending Counts

21:841A=ND.F NARCOTICS -
SELL, DISTRIBUTE, OR
DISPENSE COCAINE BASE
(1)

21:841A=ND.F NARCOTICS -
SELL, DISTRIBUTE, OR
DISPENSE COCAINE BASE
(2)

Disposition

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

**Highest Offense Level
(Terminated)**

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None

Complaints

Disposition

None

Assigned to: Judge GEORGE Z.
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Pending Counts

21:841A=ND.F NARCOTICS -
SELL, DISTRIBUTE, OR
DISPENSE COCAINE BASE
(1)

21:841A=ND.F NARCOTICS -
SELL, DISTRIBUTE, OR
DISPENSE COCAINE BASE
(2)

Disposition

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

**Highest Offense Level
(Terminated)**

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None

Complaints

None

Disposition

Plaintiff

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